Supreme Court, U.S.
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In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals violate the principles of **Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579,113S.Ct.2786, 125 L.Ed.2d 469 (1993)**...in upholding the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation" and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses, who were sequestered from hearing the testimony of each other in a re-trial which resulted in one defendant obtaining a judgment against the other for $12 Million?

Will this court order a ruling on Plaintiffs' Rule 60 Motion, filed about 3 years ago, with the affidavit of Dr. Lewell D. Brenneman, because the Trial Court ruled inadmissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin, (whose testimony was **ruled admissible by a First Circuit Trial Judge**) without considering any testimony from another immunologist specialist and without giving Plaintiffs an opportunity to present evidence from another immunologist specialist, Dr. Lewell D. Brenneman, who testifies by affidavit, below: "Dr Levin's methodology, as expressed in his affidavits and deposition, which I have reviewed for the Marsh, Speer and McLeod cases, is generally accepted among immunologists and has been subjected to peer review. This description would be clear to a practicing physician who is conversant with immunology and biological regulatory mechanisms."?

Is there a conflict in the trial courts of the First and Fourth Circuits in the recognition of Dr. Levin, an immunologist medical experts; and is there a conflict in the trial courts of the United States for the Middle and Eastern Districts of North

Carolina. Grace was granted a New Trial so it could prove 2-4D in its fertilizer; yet these Plaintiffs', after they forced Grace to produce photographs of their 1984 tobacco and submitted them for Dr. Kittrell's Deposition, below, were not allowed to have 2-4D considered as a contaminate by the court or Dr. Levin. (Dr. Levin's testimony was allowed by the court in a case which prompted EPA hearings in the Woburn contamination, which required Defendant, W. R. Grace, to pay approximately $69 Million Dollars to clean up the Woburn chemical contamination. This was the subject of the case before U.S. District Judge Skinner,who ruled admissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin.)(Dr. Levin's testimony was **ruled admissible by this First Circuit Trial Judge** long before the EPA cleanup and together with an undaunted trial lawyer inspired the movie, "A Civil Action.")

Did the trial court err and contribute to problems in these cases by refusing to consolidate Speer and McLeod with Marsh, and entering a Pretrial Scheduling Order only for Marsh, therefore, leaving plaintiffs'counsel and clients to expect a separate Pretrial Scheduling Order for Speer and McLeod with time thereafter for discovery, amendments, motions etc., which was not entered as provided in Rule of Civil Procedure (16b)?) **The Magistrate Judge denied Plaintiffs an inspection of the premises of Fritt** . He also restricted counsel from discussing with his clients the sources of the metals and waste materials from which the micronutrient mix was manufactured.

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The Court of Appeals violated the principles of **Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579,113S.Ct.2786, 125 L.Ed.2d 469 (1993)**... in upholding the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation." and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses, who were sequestered from hearing the testimony of each other in a re-trial which resulted in one obtaining a judgment against the other for $12 Million?

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OPINIONS AND ORDERS BELOW

The District Court Judgment granting Defendants' Motion for Summary Judgment is as follows:

JUDGMENT

For the reasons described in the Memorandum Opinion filed contemporaneously with this Judgment, Defendants' motions for summary judgment in each of the above captioned cases are hereby GRANTED. Any remaining motions are DENIED as MOOT.

This the 26 day of May 1998.

s/N. Carlton Tilly
United States District Judge

The unpublished Opinion of the Fourth Circuit Court of Appeals, affirming the judgment of the district court is in the Appendix at A-1. The Order of the Fourth Circuit Denying Defendants' Petition for Rehearing and Petition(s) for Rehearing En Banc is set forth in the Appendix at A- 12.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Order of the United States Court of Appeals for the Fourth Circuit Denying Plaintiffs' Petition for Rehearing and Petitioner(s) for Rehearing En Banc was entered on 17 December 2003. The Fourth Circuit's Opinion affirming the judgment of the district court allowing defendants' motions for summary judgment was entered on 19 November 2003 after oral argument 25 January 2000.

CONSTITUTIONAL PROVISION INVOLVED

The Bill of Rights provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The Court of Appeals upheld the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation." and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses (including Dr. Kittrell, who was deceived by Grace), who were sequestered from hearing the testimony of each other in a re-trial which resulted in one obtaining a judgment against the other for $12 Million?

Representative Complaints are included in Dr. Levin's Deposition Exhibits (See JA 2006 and 2052 and JA 3, Docket Entry 1a)

> Paragraph 6 "Grace fertilizer...containing **ingredients** prohibited by law as determined by the North Carolina Commissioner of Agriculture..."
>
> Paragraph 11. "Defendants knew Plaintiff's intestate and Plaintiff had been officially notified that dicamba,

which would disapate and have no effect after 60-90 days, was the only contaminate in the fertilizer."

Representative Peer review articles

Journal of the American Medical Association: "However, quantitative risk assessments used by regulatory agencies to assess risks in populations are not applicable to risks in individuals." Levin Deposition 321, 593,(JA 1557, 1830) Exhibit 16.(Speer Appendix 10) see also Waymon Marsh Affidavit for EPA Advisories, stating their studies are inadequate as to cancer(Marsh Appendix 2)(JA1007-1024) :

MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOXY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Expos ıre to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article lists 2-4D and Picloram as phenoxy acids.

MOLECULAR EPIDEMIOLOGY AND THE GENETICS OF ENVIRONMENTAL CANCER- JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION - 1991.

STATEMENT OF FACTS

Representative Peer Review Articles

Journal of the American Medical Association: "However, quantitative risk assessments used by regulatory agencies to assess risks in populations are not applicable to risks in individuals." Levin Deposition 321, 593,(JA 1557, 1830) Exhibit 16.(Speer Appendix 10) see also Waymon Marsh Affidavit for EPA Advisories, stating their studies are inadequate as to cancer(Marsh Appendix 2)(JA1007-1024) :

MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOLY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Exposure to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article lists 2-4D and Picloram as phenoxy acids.

MOLECULAR EPIDEMIOLOGY AND THE GENETICS OF ENVIRONMENTAL CANCER- JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION - 1991.

These representative peer review articles represent volumes of studies that prove picloram is a phenoxy acid and when combined with other phenoxy acids, such as 2-4D and dicamba, increase the risk 6-fold for soft-tissue sarcomas.

Affidavits of Dr. Kittrell, a Grace witness in Grace v. Fritt, who was allowed to testify about 2-4D and picloram in their second trial; however, his testimony, using photographs of 1984 tobacco (which Grace, by Order had to be compelled to produce) , was not allowed in these cases.

AFFIDAVIT

I, Dr. Benjamin U. Kittrell, being first duly sworn, do depose and say:

1. That I reside at 831 Wedgefield Rd.,Florence, S. C.29501.

2. That I am the resident Director of the Pee Dee Research and Education Center, a division of Clemson University. In that position I am responsible for administering research and education in the areas of tobacco production. During the period 1978-1987 I was Extension Tobacco Specialist for Clemson University and was responsible for the educational program for tobacco which includes the proper usages of tobacco fertilizer and herbicides in conjunction with tobacco growth and production.

3. That, as an expert in the area of tobacco and agronomy, I have testified in several trials, including the Grace v. Frit trials concerning contaminated fertilizer purchased from W. R. Grace & Co. by North and South Carolina farmers in 1984.

4. That the first I heard about the 1984 problem was a call from a South Carolina extension agent indicating a grower in his county had a problem with his tobacco just like the tobacco in the 1979 Smith-Douglas picloram-contaminated fertilizer, which caused the contaminated tobacco to be taken off the market.

5. That, shortly thereafter, I was told that, according to chemical tests, the chemical contaminant was dicamba.

6. That in 1979 I observed extensive picloram damage to tobacco on farms in South Carolina.

7. That in 1984 I observed extensive herbicide damage to tobacco in South Carolina. Again, I was told that, according to chemical tests, the chemical contaminant was dicamba.

8. That, on 20 September 1991, I was shown **Exhibits A, B and C,** which I was informed were obtained from W. R. Grace & Co. by Waymon Marsh and which show that picloram was a contaminate in the tobacco product samples. **Exhibit C** shows this sample was submitted 13 June 1984 and picloram was reported 2 July 1984. I had not seen these exhibits before 20

September 1991 and Grace did not report these tests to me as they were available.

9. That, as an expert in tobacco and agronomy, I have reviewed data for the farm of Theodore McLeod in Moore County North Carolina for the calendar years 1984 through 1991, which includes the affidavit of C. Monroe Enzor, Jr., photographs, Grace insurance adjusters' notes, attached as **Exhibit D,** 1 eaf count damage reports by Grace adjusters, attached as **Exhibit E,** and Statement of Theodore McLeod, attached as **Exhibit F**. Picloram symptoms persist in the McLeod tobacco until 1991; therefore, I concur with the opinion of C. Monroe Enzor, Jr., attached hereto as **Exhibit G.**

10. The best test for picloram is in the tobacco plant; and this test applies to the Theodore McLeod farm. This is similar to a bioassay test; and it indicates that picloram persists in the soil around and beneath the McLeod tobacco plants, which still show picloram symptoms in 1991. James Stevens, N. C. Fertilizer Administrator, concurs with this opinion in his testimony at the Grace v. Frit trial as shown in **Exhibit H.** He testified, "Although the plants were showing severe signs, we could not find anything in the soil, in the fertilizer sample I got at that point."

11. In my opinion, the symptoms of damaged tobacco leaf on the Theodore McLeod farm in 1984 and succeeding years to 1991 were caused by picloram. What the adjusters were calling dicamba in 1984 was picloram, which has persisted in the soil beneath the Theodore McLeod tobacco to 1991. My opinion accepts the truth of the statement of Theodore MeLeod that he has not used any dicamba, 2, 4-D or picloram on his farm from 1984 to 1991, except insofar as the Grace fertilizer he purchased in 1984 was contaminated with picloram, unknown by him until late 1990. Dicamba and 2, 4-D would not have persisted from July 1984 in the Theodore McLeod farm soil into the years 1985-1991.

12. That in my opinion, as an expert in tobacco and agronomy, the Gold Dollar Grace fertilizer used by Theodore McLeod on his farm in 1984 contained substantial amounts of the herbicide picloram, which is illegal for tobacco fertilizer, and

the effects of the picloram were still showing in his tobacco raised in 1991.

13. That it is below the standard of care for a manufacturer to manufacture, produce and sell fertilizer to tobacco growers containing a herbicide such as picloram. In addition these manufacturers of fertilizer and micronutrients knew or should have known that it was foreseeable that a herbicide such as picloram could find its way into their fertilizer and contaminate it, making it unfit for use as a tobacco fertilizer and harmful to the tobacco and other crops, such as garden vegetables, for which the tobacco
fertilizer had been used for years to nurture.

14. That when Monroe Enzore told me his sweet potatoes had symptoms, I told him he should test the fertilizer he had not turned in to Grace for picloram, which he did; and, according to **Exhibit I,** picloram was a contaminate. According to his affidavit he was told by the representatives of W. R. Grace, their adjusters and the North Carolina Department of Agriculture that the only illegal contaminate herbicide in the Grace Gold Dollar fertilizer, which he had used, was dicamba, so he went along thinking that none of their samples tested f or picloram, taking their word that dicamba was the only illegal contaminate in the Grace Gold Dollar fertilizer.

15. During the 1989 Grace v. Frit trial I was asked by the Grace attorneys if the tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by picloram; and I answered "Yes". The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram.

16. During the 1989 Grace v. Frit trial I was asked by the Grace attorneys if the tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by 2, 4-D; and I answered "Yes". The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram; but, in my opinion, some of the symptoms

I observed from the McLeod and Marsh 1984 photographs were consistent with symptoms caused by 2, 4-D.

17. During the 1989 Grace v. Frit trial I was asked by the Grace attorneys if the tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by dicamba; and I answered "Yes". The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram; but, in my opinion, some of the symptoms I observed from the McLeod and Marsh 1984 photographs were consistent with symptoms caused by dicamba.

18. Tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by a combination of these three phenoxy herbicides. The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram; but, in my opinion, some of the symptoms I observed from the McLeod and Marsh 1984 photographs were consistent with symptoms caused by a combination of dicamba, 2,4-D and picloram, phenoxy herbicides.

S/Benjamin U. Kittrell
BENJAMIN U. KITTRELL

Sworn to and subscribed before me
This 8th day of February, 1992.
S/John L. Martin
NOTARY PUBLIC
My commission expires: 6-20-94

AFFIDAVIT

I, Dr. Benjamin U. Kittrell, being first duly sworn, do depose and say:

1. That I reside at 831 Wedgefield Rd.,Florence, S. C.29501.

2. That I am the resident Director of the Pee Dee Research and Education Center, a division of Clemson University. In that position I am responsible for administering

research and education in the areas of tobacco production. During the period 1978-1987 I was Extension Tobacco Specialist for Clemson University and was responsible for the educational program for tobacco which includes the proper usages of tobacco fertilizer and herbicides in conjunction with tobacco growth and production.

3. That, as an expert in the area of tobacco and agronomy, I have testified in several trials, including the Grace v. Frit trials concerning contaminated fertilizer purchased from W. R. Grace & Co. by North and South Carolina farmers in 1984.

4. That the first I heard about the 1984 problem was a call from a South Carolina extension agent indicating a grower in his county had a problem with his tobacco just like the tobacco in the 1979 Smith-Douglas picloram-contaminated fertlizer, which caused the contaminated tobacco to be taken off the market.

5. That, shortly thereafter, I was told that, according to chemical tests, the chemical contaminant was dicamba.

6. That in 1979 I observed extensive picloram damage to tobacco on farms in South Carolina.

7. That in 1984 I observed extensive herbicide damage to tobacco in South Carolina. Again, I was told that, according to chemical tests, the chemical contaminant was dicamba.

8. That, on 20 September 1991, I was shown **Exhibits A, B and C,** which I was informed were obtained from W. R. Grace & Co. by Waymon Marsh and which show that picloram was a contaminate in the tobacco product samples. **Exhibit C** shows this sample was submitted 13 June 1984 and picloram was reported 2 July 1984. I had not seen these exhibits before 20 September 1991 and Grace did not report these tests to me as they were available.

9. That, as an expert in tobacco and agronomy, I have reviewed data for the farm of Waymon Marsh in Moore County North Carolina for the calendar years 1984 through 1991, which includes photographs, Grace insurance adjusters' notes, attached as **Exhibit D** and leaf count damage reports by Grace adjusters, attached as **Exhibit E.** I also reviewed correspondence from state agencies indicating negative tests for picloram and dicamba on

the Waymon Marsh farm, such as **Exhibit F,** which shows the soil samples are inconclusive. In my opinion all these tests are probably inconclusive, because the picloram symptoms persist in the Marsh tobacco until 1991; therefore, I concur with the opinion of C. Monroe Enzore, Jr., attached hereto as **Exhibit G.**

10. The best test for picloram is in the tobacco plant; and this test applies to the Waymon Marsh farm. This is similar to a bioassay test; and it indicates that picloram persists in the soil around and beneath the Marsh tobacco plants, which still show picloram symptoms in 1991. James Stevens, N. C. Fertilizer Administrator, concurs with this opinion in his testimony at the Grace v. Frit trial as shown in **Exhibit H.** He testified, "Although the plants were showing severe signs, we could not find anything in the soil, in the fertilizer sample I got at that point."

11. In my opinion, the symptoms of damaged tobacco leaf on the Waymon Marsh farm in 1984 and succeeding years to 1991 were caused by picloram. What the adjusters were calling dicamba in 1984 was picloram, which has persisted in the soil beneath the Waymon Marsh tobacco to 1991. My opinion accepts the truth of the statement of Waymon Marsh that he has not used any dicamba, 2, 4-D or picloram on his farm from 1984 to 1991, except insofar as the Grace fertilizer he purchased in 1984 was contaminated with picloram, unknown by him until 1989. Dicamba would not have persisted from July 1984 in the Waymon Marsh farm soil into the years 1985-1991.

12. That in my opinion, as an expert in tobacco and agronomy, the Gold Dollar Grace fertilizer used by Waymon Marsh on his farm in 1984 contained substantial amounts of the herbicide picloram, which is illegal for tobacco fertilizer, and the effects of the picloram were still showing in his tobacco raised in 1991.

13. That it is below the standard of care for a manufacturer to manufacture, produce and sell fertilizer to tobacco growers containing a herbicide such as picloram. In addition these manufacturers of fertilizer and micronutrients knew or should have known that it was foreseeable that a herbicide such as picloram could find its way into their fertilizer and contaminate it, making it unfit for use as a tobacco fertilizer

and harmful to the tobacco and other crops, such as garden vegatables, for which the tobacco fertilizer had been used for years to nuture.

14. That when Monroe Enzore told me his sweet potatoes had symptoms, I told him he should test the fertilizer he had not turned in to Grace for picloram, which he did; and, according to **Exhibit I,** picloram was a contaminate. According to his affidavit he was told by the representatives of W. R. Grace, their adjusters and the North Carolina Department of Agriculture that the only illegal contaminate herbicide in the Grace Gold Dollar fertilizer, which he had used, was dicamba, so he went along thinking that none of their samples tested for picloram, taking their word that dicamba was the only illegal contaminate in the Grace Gold Dollar fertilizer.

s/Benjamin U. Kittrelll

BENJAMIN U. KITTRELL

Sworn to and subscribed before me
this_9th day of_October_, 1991.
S/Sibil S. Warren
NOTARY PUBLIC
My commission expires: April 10, 1995

After 260 pages of grueling examination by both attorneys for defendants , which lasted into a second day, Dr .Kittrell, who had been examined by both law firms in Grace's $12 Million verdict, testified that he still stood fully behind the opinions in the above affidavits, over objection of both attorneys, "Yes, based upon the information that I have documented in these affidavits, I still concur with my opinion." Note, he had been deceived by Grace in testifying as its witness because he was told of only one contaminate-dicamba. " I had not seen these exhibits before 20 September 1991 and Grace did not report these tests to me as they were available."(paragraph 8 above)

The following affidavit of Dr. Brenneman was filed with the Rule 60 motion after the appeal, because it was needed to

point out the errors in the Trial Court Decision. We request an order for an appealable decision on this affidavit.

AFFIDAVIT

1. My name is Lewell D Brenneman. I am a medical doctor and an immunologist, licensed by the State
2. The joint affidavit defense experts Drs Guzelian, James, Sandler, and Smith, are deficient and/or erroneous in their opinions for several reasons:

   2.1 They are not adequately trained or working in the field of immunology or cancer biology. Instead they specialize in toxicology and/or epidemiology and, judging from their voluminous research, they are principally focused on large populations studies with mathematical predictability. Apparently they leave the clinical treatment of individual patients to other physicians.

   2.2 In their discussion on the dose-response relationship, it is clear that these experts are either unaware and/or ignore many well-known areas in immunology, cancer biology, and statistical variation. Therefore, their partial truths give false impressions that every member of a statistical populations is identical to the mean, that there is no distribution around that mean, and that dose-response relationships work just as well for individuals as they do for large populations. They failed to mention the variable distribution of populations or the collapse of the dose-response relationship in individuals. Dr Levin's testimony in the Marsh, McLeod and Speer cases with regard to dose-response is in accord with generally accepted methodology used by immunologists that has been subjected to peer review.

2.3 There are a number of idiosyncratic and other biological mechanisms which are NOT subject to dose-response relationship (1,4); these experts appear unaware them. This is understandable given their principal focus on predictable toxicology and/or epidemiology. They fail to understand that in certain biological systems, a very few molecules are capable of striking a vital cellular target that results in cancer or immune suppression, just as a sharpshooter is more effective with only a single shot than is a machine gun. And eating the calculated bags of fertilizer may enhance the chances of cancer but is hardly a necessity, because there are no "safe" doses for carcinogens, including, but not limited to, the phenoxy herbicides Picloram, Dicamba, and 2,4-D, any more than there are "safe" doses for bullets.

2.4 The joint experts failed to mention that there exists statistical variability in the timing of gene alterations and the sequence of colon cancer development (joint expert's Figure 2), although they imply the contrary. This is also true, for example, for lung and cervical cancer.

2.5 The joint experts failed to mention that in the middle step cancer sequence, the latent assault is highly significant in the production of clinical cancer. For example an old osteoporosis woman, who has predisposing problems, would not be severely injured if she was not in an auto accident.

2.6 The joint experts failed to mention that the Hill criteria, as are many phenomena, are subject to statistical variability and interpretation.

3. In his deposition and affidavits, Alan S Levin, MD, clearly describes the methodology by which medicine is bound both legally and ethically to utilized, such as the history, physical examination, and laboratory studies. Dr Levin's methodology, as expressed in his affidavits and deposition, which I have reviewed for the Marsh, Speer and McLeod cases, is generally accepted among immunologists and has been subjected to peer review. This description

would be clear to a practicing physician who is conversant with immunology and biological regulatory mechanisms. These Joint Affidavit Doctors are not in the same field of medicine - Immunology; therefore, their opinion as to Dr Levin's methodology are not valid.

4. Dr Levin's description of the cause of cancer is a well-accepted fact, specifically, that cancer is allowed to arise at times when the immune system is suppressed. Therefore, the immune suppressive effects of picloram and/or Dicamba and 2,4-D are a major factor in the causation of cancer (3,4,5,6).
5. Similar to other phenomena, the Hill criteria are governed by the laws of statistics which render These criteria highly variable, especially among individuals.
6. It is incomprehensible that professors at highly respected universities would "conveniently" ignore "inconvenient" evidence. It is unconscionable that they omitted mention of basic statistical parameters such as (a) the distribution around the mean, which results in errors of means of variability and (b) population size, which results in greater errors. Such omissions imply that these parameters are without variability and error, which is untrue. In addition, authoritative medical textbooks describe a number of biological mechanisms that do not conform to the dose-response theory or to other Hill criteria of toxicology (1,2,4). Therefore in view of these errors, the opinions of these experts must be rejected and replaced with those which take into account the entire body of evidence in this case.
7. Based upon my training, education, experience, and the medical literature, it is my opinion to a reasonable degree of medical certainty that the opinions of Dr Levin, after reviewing his deposition and affidavits on picloram, 2,4-dichloropheoxyacetic acid, and dicamba in the Marsh, Speer and McLeod cases are valid opinions, based on facts and data reasonable relied on by immunologists, with which I agree and, in my opinion as an immunologist, will

assist the Jury in understanding the evidence and determining the facts in issue, and are based on factors which comply with the Daubert requirements.

8. After reviewing the judgment of Judge Tilley and I would point out several errors.

8.1 It has been shown that picloram is carcinogenic in animals and the IARC considers it to be a possible human carcinogen. This satisfies the bioplausibility prong the Daubert analysis.

8.2 The medical/scientific community generally accepts that human cancer is caused, in part by the interaction of an endogenous proto-oncogene/oncogene and a carcinogen. This satisfies the general acceptance prong of the Daubert analysis.

8.3 On page 5, the Judgment implies that the medical/scientific community does not accept the concept that all human disease is a function of the host's reaction to an etiologic agent. This could be no farther from the truth. It is generally accepted that three different persons could receive the exact same dose of the exact same agent and develop three different diseases as a result of this exposure. Three people could receive the exact same dose of HIV virus from the exact same donor and one will develop Kaposi's sarcoma, another pneumocystis pneumonia, and the third a B cell lymphoma. Three people could receive the exact same dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens are similar to gunshots- the same gun may damage different parts of different people. Judge Tilley is apparently unaware of these factors.

8.4 The fact that all three individuals developed cancers which are associated with picloram after they were chronically exposed to picloram is unlikely to be coincidental. That is, it is more likely than not that the picloram to which these individual were exposed is a

cause or a substantial contributor to each of their cancers. This opinion is reached after using generally accepted medical and scientific methods which have been subjected to peer review.

8.5 On page 6, the Judgment implies that the a given carcinogen must cause a specific type of cancer. This is not true. Three people could receive the exact same dose of HIV virus from the exact same donor and one will develop Kaposi's sarcoma, another pneumocystis pneumonia, and the third a B cell lymphoma. Three people could receive the exact same dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens, including but not limited to the phenoxy herbicides, Picloram, Dicamba and 2,4-D, are similar to gunshots- the same gun may damage different parts of different people. On the other hand asbestos most often causes only one type of cancer, lung cancer.

Medical Literature References

1. Goodman & Gilman's the pharmacological basis of therapeutics, 9th ed. Joel G. Hardman, Lee E. Limbird et al, 1996. page 67
2. Ibid, page 1087
3. Harrison's Principles of Internal Medicine by Isselbacher, et al, 13th ed 1995, Ch 390 Sec 5
4. ibid, Ch 277 Sec 1
5. Adams et al, Vet Hum Toxicol, 1991, 33(3):209
6. Balkely BR, Vet Hum Toxicol, 1997, 39(4):204

"I, Alan S. Levin, M.D., being a practicing physician for over 3 decades, being a world renown expert in cancer, being certified by the American Board of Allergy & Immunology and the American Board of Pathology, being on the faculty of the University of California in San Francisco for over 20 years, being a member of the Medical Board of the State of California using widely accepted basic scientific reasoning have come to the

opinion, based upon my experience, my training, and my review of the peer reviewed medical literature, that the tainted fertilizer in question did cause the diseases at issue. This is relevant testimony from a qualified expert witness. In the absence of a credible defense, this opinion would cause a reasonable juror to return a verdict in favor of the plaintiff. Based upon these facts, summary adjudication should not be issued and this case should go to trial in front of a jury of the plaintiff's peers."

It is clear that the Daubert factors should not really be in dispute.

REASONS FOR GRANTING THE WRIT

We submit the Court of Appeals for the Fourth Circuit violated the principles of **Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S.579,113S.Ct.2786, 125 L.Ed.2d 469 (1993)**...in upholding the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation" and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses, who were sequestered from hearing the testimony of each other in a re-trial which resulted in one defendant obtaining a judgment against the other for $12 Million?

We submit this court order a ruling on Plaintiffs' Rule 60 Motion, filed about 3 years ago, with the affidavit of Dr. Lewell D. Brenneman, because the Trial Court ruled inadmissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin, (whose testimony was **ruled admissible by a First Circuit Trial Judge**) without considering any testimony from another immunologist specialist and without giving Plaintiffs an opportunity to present evidence from another immunologist specialist, Dr. Lewell D.

Brenneman, who testifies by affidavit, below: "Dr Levin's methodology, as expressed in his affidavits and deposition, which I have reviewed for the Marsh, Speer and McLeod cases, is generally accepted among immunologists and has been subjected to peer review. This description would be clear to a practicing physician who is conversant with immunology and biological regulatory mechanisms."

We submit thereis a **conflict** in the trial courts of the First and Fourth Circuits in the recognition of Dr. Levin, an immunologist medical experts; and is there a conflict in the trial courts of the United States for the Middle and Eastern Districts of North Carolina. Grace was granted a New Trial so it could prove 2-4D in its fertilizer; yet these Plaintiffs', after they forced Grace to produce photographs of their 1984 tobacco and submitted them for Dr. Kittrell's Deposition, below, were not allowed to have 2-4D considered as a contaminate by the court or Dr. Levin. (Dr. Levin's testimony was allowed by the court in a case which prompted EPA hearings in the Woburn contamination, which required Defendant, W. R. Grace, to pay approximately $69 Million Dollars to clean up the Woburn chemical contamination. This was the subject of the case before U.S. District Judge Skinner,who ruled admissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin.)(Dr. Levin's testimony was **ruled admissible by this First Circuit Trial Judge** long before the EPA cleanup and together with an undaunted trial lawyer inspired the movie, "A Civil Action.")

Did the trial court err and contribute to problems in these cases by refusing to consolidate Speer and McLeod with Marsh, and entering a Pretrial Scheduling Order only for Marsh, therefore, leaving counsel and clients to expect a separate Pretrial Scheduling Order for Speer and McLeod with time thereafter for discovery, amendments, motions etc., which was not entered as provided in Rule of Civil Procedure (16b)?

The Court of Appeals, on page 8, alludes to an "...independent conclusion that picloram causes cancer." By Dr. Levin. We submit this is error because the peer review, MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOLY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Exposure to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article list 2-4D and Picloram as phenoxy acids, refutes the court's statement.

Additionally, the Court of Appeals states: "Neither the National Toxicology Program nor the Environmental Protection Agency have listed picloram as a carcinogen." We submit this is not controlling because the peer review, **Journal of the American Medical Association: "However, quantitative risk assessments used by regulatory agencies to assess risks in populations are not applicable to risks in individuals." Levin Deposition 321, 593,(JA 1557, 1830) Exhibit 16.(Speer Appendix 10) see also Waymon Marsh Affidavit for EPA Advisories, stating their studies are inadequate as to cancer(Marsh Appendix 2)(JA1007-1024)** , refutes the court's reliance on this statement.

It is noted that only after the trial lawyer and Dr. Levin presented his testimony to Judge Skinner in the Woburn case did EPA step in and require W. R. Grace to pay for a $69 Million Dollar cleanup.

Another Grace witness testified in the second trial to these facts:

McNair-1-10,000 parts

3. Dr. McNair testifies one phenoxy sample in parts per billion: "THAT WOULD BE ONE TO TEN THOUSAND PARTS PER BILLION, EXTREMELY LARGE CONCENTRATION

BASED ON THIS SORT OF SAMPLE WE HAVE BEEN LOOKING AT BEFORE." (Tp. 25)

4. Dr. McNair describes a dirty sample with several major peaks off scale. He confirms 2,4D, which was a phenoxy found at the Frit plant site and in its micronutrient mix. (Tp. 695)

We submit that Grace hid this evidence, because they knew this amount of any of the illegal ingredients (Dr. McNair also confirmed picloram as an illegal contaminant) was extremely deadly since it was about 5 times that found in the 1979 Smith-Douglas case, which took all the tobacco off the market. Yet Grace and these defendants conspired to suppress this evidence during the growing season at a high risk to these farmers and probably those who smoked the 1984 tobacco. Grace's full page newspaper ads stated there were only trace accounts of dicamba and told the farmers it was safe to raise the tobacco and eat from gardens fertilized with their Gold Dollar fertilizer.

Just like the Ford Pinto case defendants played the odds in "suppressing the potential damaging circumstances". Our case could not have been proved but for the Grace low verdict of $2 Million Dollars, which was set aside, so Grace could mend its lick and prove all these other illegal ingredients and the large amounts in some samples in order to prove what they had actually paid in 1984 for 1800 farms-$12 Million Dollars-without taking all the tobacco off the market. In 1979 Smith-Douglas paid $20 Million Dollars for 1200 farms after taking the tobacco off the market. Dr. McNair's sample was 5 times more deadly for the 1984 contamination. But the tobacco companies could take the hit and no one would have known about the risk, except for the necessity for Grace's second trial, because they only proved trace amounts of harmless dicamba in the first trial, which proved to be a lie in the second trial.

Ambrosini v. Labarraque, 101 F.3d 129 (C.A.D.C. 1996), we contend correctly applies Daubert: "Even if the burden placed on the "gatekeeper" may seem heavy at times, *see, e.g., Daubert*, 509 U.S. at 600-01, 113 S.Ct. at 2800 (Rehnquist, C. J., concurring in

part and dissenting in part), there is nothing in *Daubert* to suggest that judges become scientific experts, much less evaluators of the persuasiveness of an expert's conclusion. Ambrosini v. Labarraque, 101 F.3d 129, 134 (C.A.D.C. 1996)

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Judgment of the Trial Court should be reversed with instructions to reopen Discovery for Plaintiffs to prove 2-4D and any other "illegal ingredient prohibited by law"(as alleged in the complaint and clearly known by defendants) in the Grace Gold Dollar fertilizer, and admit the testimony of Dr. Levin.

Hopefully this case will be re-opened and allowed to go to the jury. These are other evidence and matters for consideration:

Our case can be distinguished from smoker-lung cancer cases since Mr. Marsh suffered from an undifferentiated large cell tumor while smokers generally suffer from small cell cancer. Mr. Marsh's tumor is rare in older cigarette smokers.

"The majority of lung cancers can be categorized into four histologic types. Squamous cell carcinoma, small-cell undifferentiated carcinoma, large-cell undifferentiated carcinoma, and adenocarcinoma 31 . There is a well established direct correlation between the dose of cigarette smoke and the first two types of cancer. The type of cancer that Mr. Marsh suffered (undifferentiated large cell) is not correlated with the dose of cigarette smoke. It's incidence is actually inversely related to the dose of cigarette smoke and is not common in people over 60.

The Opinion and Judgment imply that the medical/scientific community does not accept the concept that all human disease is a function of the host's reaction to an etiologic agent. This is erroneous. It is generally accepted that different persons could receive a dose of the exact same agent and develop different diseases as a result of this exposure. Three people could receive a dose of HIV virus

from the exact same donor and each could develop a different disease. Three people could receive a dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens are similar to gunshots- the same gun may damage different parts of different people. The Trial Judge was apparently unaware of these factors. (JA 1074-1161,2115-2118)

The fact that all three individuals developed cancers which are associated with picloram after they were chronically exposed to picloram, and/or 2,4D, and/or dicamba is unlikely to be coincidental. That is, it is more likely than not that the picloram, and/or 2,4D, and/or dicamba to which these individuals were exposed is a cause or a substantial contributor to each of their cancers. This opinion is reached after using generally accepted medical and scientific methods which have been subjected to peer review.(JA 1074-1161, 2115-2118)

The Opinion and Judgment imply that a given carcinogen must cause a specific type of cancer. We respectfully contend this is erroneous. Three people could receive a HIV virus from the exact same donor and die from different diseases. Three people could receive the exact same dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens, including but not limited to the phenoxy herbicides, Picloram, Dicamba and 2,4-D, are similar to gunshots- the same gun may damage different parts of different people. On the other hand asbestos most often causes only one type of cancer, lung cancer.(JA 1074-1161, 2115-2118)(See also, JA 1956-2156)

Dr. Levin's opinions were not accepted by the Trial Court as valid. But Peer review articles, as well as Dr. Levin, state that immunologists consider Dr. Levin's affidavit and deposition opinions to be **valid**. The peer review article on **Molecular Epidemiology and the Genetics of Environmental Cancer** supports Dr. Levin's affidavit and deposition opinions as **valid**

and suggests that classic epidemiologic techniques are out of step "to the assessment of risk in individuals." Surely Admiral Zumwalt, who lost his son to cancer from the agent orange he ordered in Vietnam, would have been better served with a Dr. Levin advising him on the use of agent orange on the Battlefields of Vietnam. If he could have prevented this debacle, he could have added, if appropriate, the Medal of Honor to Dr. Levin's Silver Star and Bronze Star for Valor he was awarded for heroism in Vietnam. U.S. District Judge Skinner did have this American Hero on the Battlefields of Pollution advising the Court in the Woburn case, which has provided the inspiration for the movie, "A Civil Action."

How much Super Fund money-how many lives-could have been saved if pollution greed had not taken over? We request the Court to take Judicial Notice of the Agent Orange Hearings before Congress and the EPA hearings in the Woburn contamination, which required Defendant, W. R. Grace, to pay approximately $69 Million Dollars to clean up the Woburn chemical contamination, which was the subject of the case before U.S. District Judge Skinner.

Additionally, consider that Fritt, as well as Grace, did not want any more EPA problems. Supporting documents show:

PSD-27 Documents of Frit EPA problems

PSD-28 Documents to further show Frit actions

PSD-28A Baldwin testimony proving 2 phenoxy chemicals-2,4-Dand 245T SILVEX were on the Frit Walnut Ridge property, where the micronutrient mix was manufactured.

28B Environmental violations by Frit which "...pose a serious threat to human health and the environment."

28C Memo of Frit-Grace meeting discussing how Grace "...had supressed the potentially damaging circumstances around the tobacco situation."

This give some explanation for why Plaintiffs we not allowed to inspect the Fritt plant.

There was another peer review article for canines: "CASE-CONTRO STUDY OF CANINE MALIGNANT LYMPHOMA

POSITIVE ASSOCIATION WITH DOG OWNER'S USE OF 2-4D HERBICIDES" TARONE-CANTOR-JESSEN-RICHARDSON. Tordon is a herbicide, containing Picloram and 2-4D, used to control weeds in lawns.

Grace, for Frit, had expressly warranted that **dicamba, the only contaminant, would be gone in 60-90 days and that it was safe (there were only trace amounts) for farmers to eat from their gardens to which the contaminated fertilizer had been applied.** This was a fraudulent warranty, which Grace perpetuated by letter, newspaper ad (JA 964- 965) and adjusters because on 2 July 1984, prior to the letter and ad, Grace had a test (JA 966) which proved picloram; and another witness, Dr. McNair (who Plaintiff has identified as a Grace trial witness it intends to call-Defendants, not Plaintiff, had the names, addresses and telephone numbers) testified that there was more than trace amounts of the phenoxy, **"That would be one to ten thousand parts per billion. Extremely large concentration based on this sort of sample we have been looking at before." (JA 967).**

Plaintiff, under the original complaint has the right to prove either **picloram** or **2,4-D** or any other contaminant was an additional contaminate or additional contaminants, because either proof would prove Defendants were responsible for a **breach of express warranty or false representation or a misrepresentation.**

Plaintiff, under the original complaint has the right to prove that the contaminant or contaminants did **not** dissipate in 60-90 days and that it was **not** safe to eat from gardens and work in tobacco fertilized with this contaminated Gold $ fertilizer, because either proof would prove Defendants were responsible for a **false representation or a misrepresentation**. Had this false representation not been made Grace would have paid the farmers $60M rather than $6M. (JA 928) Also refer to JA 518 for another reason for the false representations.

Plaintiff, under the original complaint has the right to prove under paragraph 17 "compensatory damages in excess of $10,000." This includes damages from one or more phoenixes

because: 1)the **only** contaminant in the Gold $ fertilizer was **not just dicamba**, and 2)it did **not** dissipate in 60-90 days and it was not safe to eat from gardens and work in tobacco fertilized with this contaminated Gold $ fertilizer.

Defendants also referred to the contaminant as only trace amounts of dicamba and encouraged farmers "to continue your normal cultivation and harvest...practices," which according to Dr. McNair is false.

Since Defendants' misrepresentation is also an express warranty, GS 106-662(e)(4) does not apply. "Even if the provisions of section 106-662(e)(4) were deemed to apply, the Department of Agriculture has certified that W. R. Grace fertilizer containing micronutrient mix used ingredients prohibited by the provisions of the article," according to the Fertilizer Administrator's affidavit. **(JA 1017).** Dr. Kittrell identified the photos (JA 974) to show symptoms of three phoenixes-picloram, dicamba and 2,4 D.

Plaintiff, however, out of an abundance of caution, included an allegation to cover the multiple contaminants point in the proposed amendment. Plaintiff had already alleged two phoenixes-dicamba and picloram. Note, on page 2 of **(JA 894-901, 895)** picloram is named as a phenoxy. This and companion cases involve death by false warranty. It is manifestly unfair to attempt to exclude evidence which Defendants have had full knowledge of since 1984. At the Grace v. Frit second trial two exhibits were utilized for showing the contamination. (JA 969 and 970) **(Exhibit 10)** Neither mentioned 2,4D. Grace in the first trial was not allowed to prove 2,4D; but did secure a $1 Million verdict for breach of warranty. The Judge realized the confusion on the part of the jury. He set aside this verdict, allowed evidence of 2,4D at the second trial; and a $12 Million verdict was rendered. If the persuasion and resources of W. R. Grace can obtain a new trial, certainly this Plaintiff is entitled to present the same evidence.

The significance of 2,4-D was buried in the Grace v. Frit trials. The first case went to the jury without certain evidence about 2,4-D; but the Trial Judge reversed himself

and allowed the evidence almost a year later in the second trial. Certainly this Plaintiff should be treated as fairly as Grace was when it was a Plaintiff. Plaintiff requests the Court to consider the entire opinion in Foman v. Davis, supra. Counsel has been laboring under a serious health condition(subsequently had open heart surgery). The Supreme Court refers to the spirit of the federal rules for decisions on the merits and not on the skill of counsel capitalizing on a decisive misstep by counsel.

****

PLAINTIFF SUPPORTING DOCUMENTS

PSD-1 Transcript filed in McLeod v. Grace, 3:9100047

PSD-2 Order-Judge Cornelius denying Motion to Dismiss, Brief and Order allowing Frit to substitute attorneys.

PSD-3 Speer Deposition in which he shows a coverup with all Defendants working together.

EXCERPTS OF TRANSCRIPT

PSD-4 Dr. Robert McKinney-Grace employee-shows picloram is overwhelming contaminate.

PSD-5 Harold Monroe McNair describes major peak for picloram and something worse.

PSD-6 Harold Coble says picloram is contaminate because he says not enough dicamba or 2-4-d to affect tobacco.

PSD-7 Dr. Ben Kittrell said first report was picloram.

PSD-8 Dave Wesley Benfield-Frit employee-was warned by Grace that Frit was suspect for causing contamination.

PSD-9 Frank M. Dabney, Jr. says no Frit samples ever tested.

PSD-10 Glenn Cason says Frit scrap filler is everything mixed up so we can't sell it, from one batch to another do not really know what it is.

PSD-11 Mr. Maready sums up, "It makes it pretty obvious that Brian Rogers is right when he tells you that what I thought I was looking at was picloram. Because it shows up in everything which follows."

PSD-12 Affidavit of tobacco expert, C. Monroe Enzor, Jr., who states in his opinion Waymon Marsh Gold Dollar fertilizer contained picloram, and effects were still showing in his tobacco raised in 1990. Now 1991.

PSD Dr. Levin Deposition-cancer caused by picloram exposure and continued exposure caused by Defendants fraudulent concealment is a contributing factor.

PSD-14 Fertilizer Administrator-Grace Gold Dollar Fertilizer contains ingredients prohibited by law.

PSD-15 N. C. Supreme Court Decision discussing the worthlessness of the Grace Gold Dollar Fertilizer.

PSD-16 7-2-84 Grace Test reporting picloram.

PSD-17 7-24-84 Dicamba ad not reporting picloram to public.

PSD-18 Jesneck deposition proving picloram in Enzor fertilizer.

PSD-19 Dr. Kittrell, tobacco expert and witness at Grace v. Frit trial who confirms picloram on the Marsh and McLeod Farm, where the decedents were exposed to picloram and other phenoxies. Two affidavits together with videos and photos.

EXCERPTS OF TRANSCRIPT

PSD-20 Frit Plant Chemist, Roscoe McNutt, Jr. testifies Frit samples, by company policy, were retained for one year. Tp 905-912.

PSD-21 Vice-Pres. Carl Schauble admits Grace samples were not retained one year as required by company policy and procedure, which had been followed by Plant Chemist. Tp 1385, 1409-1415.

PSD-22 Vice-Pres. David Wesley Benfield admits meeting with Grace representatives, discussing the contamination as it relates to Frit micronutrient mix and then discussing it with Vice-Pres. Schauble. Tp 897-905.

PSD-23 U. S. Judge consideration of Dr. Levin's affidavit.

PSD-24 Memo to Judge Tilley-Rowan case-Concert of Action

PSD-25 Grace Memo on fertilizer statute.

PSD-26 Sinclair farms file-paid for other crops

PSD-27 Documents of Frit EPA problems

PSD-28 Documents to further show Frit actions

PSD-28A Baldwin testimony proving 2 phenoxy chemicals-2,4-D and 245T SILVEX were on the Frit Walnut Ridge property, where the micronutrient mix was manufactured.

28B Environmental violations by Frit which "...pose a serious threat to human health and the environment."

28C Memo of Frit-Grace meeting discussing how Grace "...had supressed the potentially damaging circumstances around the tobacco situation."

28D Grace trial Exhibit 11-A, which proves Frit micronutrient mix used in Gold Dollar fertilizer to which Plaintiff's husband was exposed contained three phenoxy chemicals, which Dr. Kittrell says were on the Marsh farm according to the tobacco symptoms-the same evidence admitted in the Grace v. Frit trial.

PSD-29 Misleading Frit statement about retention of samples.

PSD-30 Persistence of picloram and 2,4 D, test and run off.

PSD-31 Jury verdict in second Grace v. Frit trial and order and issues setting aside jury verdict in first trial.

PSD-32 Peedin memos and letters confirming Kittrell opinion of persistence of phenoxy chemical on the Marsh farm after 1984.

PSD-33 Grace memorandum-evidence of 2,4 D at Frit plant is admissible.

Respectfully submitted,

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Petitioners' Counsel of Record

No._____

In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

HALIA S. MARSH, Executrix of the estate of Robert Sidney Marsh,
Plaintiff-Appellant,

v.

W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY,
Defendants-Appellees.

No. 98-1943

THEODORE C. MCLEOD,
Plaintiff-Appellant,

v.

W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY,
Defendants-Appellees.

No. 98-1944

THOMAS R. SPEER,
Plaintiff-Appellant,

v.

W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY,
Defendants-Appellees.

No. 98-1945

Appeals from the United States District Court
for the Middle District of North Carolina, at Rockingham.
N. Carlton Tilley, Jr., Chief District Judge.
(CA-90-613-3, CA-91-47-3, CA-91-48-3)

Argued: January 25, 2000

Decided: November 19, 2003

Before WIDENER, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished opinion. Judge Widener wrote the opinion, in which Judge Luttig and Judge Michael concurred.

COUNSEL

ARGUED: John Randolph Ingram, Asheboro, North Carolina, for Appellants. Jonathan A. Berkelhammer, SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellee Frit Industries; B. Gordon Watkins, III, KILPATRICK STOCKTON, L.L.P., Winston-Salem, North Carolina, for Appellees W.R. Grace and Continental Casualty. **ON BRIEF:** James D. Cowan, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellee Frit Industries; Steve M. Pharr, KILPATRICK STOCKTON, L.L.P., Winston-Salem, North Carolina, for Appellees W.R. Grace and Continental Casualty.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

WIDENER, Circuit Judge:

Plaintiffs Halia S. Marsh, executrix of the estate of Robert Sidney Marsh, Thomas R. Speer, and Theodore McLeod, executor of the estate of Beulah M. McLeod, appeal from the district court's decision granting summary judgment to defendants W.R. Grace & Co. (Grace), Frit Industries, Inc. (Frit), and Continental Casualty Company. *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613 (M.D.N.C. May 26, 1998). Plaintiffs brought a product liability action against the defendants stemming from their use of fertilizer contaminated with the chemical picloram. They alleged that the picloram caused Marsh, Speer, and Mrs. McLeod to develop cancer. The plaintiffs had one expert, Dr. Scott Levin, who testified that the contaminated fertilizer caused the plaintiffs' cancers. The district court found that Dr. Levin's testimony did not satisfy the admissibility requirements for expert testimony required by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and consequently, granted the defendants' motions for summary judgment because the plaintiffs provided no additional evidence that the picloram caused their injuries. Plaintiffs appeal from that decision and from the district court's denial of the motions of Mrs. Moore and Speer to amend their complaints to include chemicals other than picloram as the cause of their injuries. *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613 (M.D.N.C. Oct. 13, 1992); *Speer v. W.R. Grace & Co.*, No. 3:91CV00048 (M.D.N.C. Dec. 9, 1994). For the reasons set forth below, we affirm the decisions of the district court.

I.

The underlying facts of this case are not complicated and largely not in dispute. Because we are reviewing disposition of this case on summary judgment, we examine the facts as found by the district court after it construed the case in the light most favorable to the plaintiffs. *Beall v. Abbott Lab.*, 130 F.3d 614, 618-19 (4th Cir. 1997). In 1984, Grace manufactured and sold Gold Dollar tobacco fertilizer using a micronutrient mix provided by Frit which included picloram. All of the plaintiffs are North Carolina farmers — Marsh and Speer worked on Marsh's son's, Waymon Marsh's, farm, and the McLeods

worked on their own farm. The plaintiffs purchased and used, either or both, Grace's Gold Dollar fertilizer on tobacco crops and on vegetable gardens. Each of the plaintiffs subsequently discovered that the Gold Dollar fertilizer contained several ingredients it should not have, including picloram, a broadleaf herbicide. For several years, the plaintiffs were exposed to the picloram while handling the fertilizer itself, from contact with soil and water contaminated by picloram from the fertilizer, by eating vegetables from gardens contaminated by the fertilizer, and from eating fish from a pond contaminated by fertilizer run-off.

Between 1984 and 1988, all of the plaintiffs suffered from some type of cancer. Marsh was diagnosed with lung cancer in October 1988, and he died two weeks later at the age of 78. Speer discovered he had colorectal cancer in March 1988 at the age of 65, but he received successful treatments for the disease. Mrs. McLeod was diagnosed with cervical cancer in August 1986. She died from the disease two years later at the age of 74.

In 1990, each of the plaintiffs filed their suits against Frit, Grace, and Continental Casualty Company in North Carolina state court. All three complaints alleged that the defendants failed to warn the plaintiffs of the contaminated fertilizer, made false representations concerning the contaminants in the fertilizer, negligently manufactured the fertilizer, breached their express and implied warranties, and participated in unfair settlement practices. The plaintiffs all claimed damages incurred as a result of their respective cancers, which they alleged were proximately caused by the picloram in the fertilizer.

The defendants removed all three cases to federal court in December 1990. The parties then engaged in extensive discovery, including an exhaustive deposition of the plaintiffs' expert witness, Dr. Levin. On October 28, 1991, the defendants moved for summary judgment in the Marsh case. In March 1992, Mrs. Marsh made a motion pursuant to Federal Rule of Civil Procedure 15(a) to amend her complaint to include chemicals other than picloram, specifically 2,4-D. The court declined her motion on the basis that she had unduly delayed making the motion and that the defendants would be unfairly prejudiced if it was granted. In October 1994, soon after the close of discovery, Speer made a motion to amend his complaint under Rule

15(a) that was essentially identical to the one Mrs. Marsh had previously made. In November 1994, the defendants filed motions for summary judgment in the Speer and McLeod cases. The court denied Speer's motion to amend his complaint citing the same reasons it denied Mrs. Marsh's motion in addition to the fact that the parties had again reached summary judgment stage in the proceedings. On May 26, 1998, after reviewing the defendants' motions for summary judgment in all three cases, the district court found that Dr. Levin's testimony that picloram caused the plaintiffs' cancers did not meet the requirements for admissibility of expert testimony set forth in *Daubert*. *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613, slip op. at 12 (M.D.N.C. May 26, 1998). Without Dr. Levin's testimony, the district court found that there was no genuine issue of material fact with respect to proximate causation and granted the defendants' motions for summary judgment. *Marsh*, No. 3:90CV00613, slip op. at 3-5. The plaintiffs now appeal the district court's exclusion of Dr. Levin's testimony and denial of their requests to amend their complaints.

II.

A.

We review a district court's decision granting a motion for summary judgment *de novo*. *Metropolitan Life v. Pettit*, 164 F.3d 857, 860 (4th Cir. 1998). The district court's decision on the motion for summary judgment in this case turned on the exclusion of expert testimony under *Daubert*. We review a district court's decision to exclude expert testimony for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997). We first address the plaintiff's contention that the district court erroneously excluded Dr. Levin's testimony and, second, the court's subsequent decision to grant summary judgment for the defendants.

In *Daubert*, the Supreme Court set forth the two-part inquiry a district court must engage in when determining whether to admit expert testimony. The district court must exercise a gatekeeping function in which it only admits expert testimony that is both reliable and relevant. *Daubert*, 509 U.S. at 589. We are only concerned with the reliability prong of the test in this case because the evidence was relevant to the causation element of the plaintiffs' case.

The *Daubert* analysis is a flexible one, *Daubert*, 509 U.S. at 592-93, 594-95, and, to aid courts engaging in the reliability analysis, the Court provided four non-exclusive factors that the district court could consider when evaluating proposed expert testimony: (1) whether the evidence can be tested, (2) whether the theory has been subjected to peer review or publication, (3) the known or potential rate of error of the technique, and (4) whether the relevant scientific community has generally accepted the theory. *Daubert*, 509 U.S. at 593-94. The focus of the district court's inquiry should be the principles and methodology of the expert, not the conclusions reached. *Daubert*, 509 U.S. at 595. The overall goal of the *Daubert* analysis is to ensure that "an expert, whether basing his testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The Court instructs us to provide district courts with "broad latitude," p.142, or "considerable leeway," p.156, both as to the method used to decide whether to admit expert testimony and to the decision whether to admit or exclude the testimony. *Kuhmo Tire*, 526 U.S. pp.142, 156. Under the abuse of discretion standard, we examine the record and the rationale of the district court and reverse its decision only if it made a clear error in judgment. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). We are of opinion that the record supports the district court's analysis and decision to exclude Dr. Levin's testimony.

Our review of the district court's opinion discloses that the court found Dr. Levin's methods and logical processes used to reach his opinion on causation were unreliable. Dr. Levin is a medical doctor specializing in pathology, immunology, and cancer who has researched and written about cancer. In determining the cause of his patients' cancers, Dr. Levin relies on his evaluation of individual responses to a given intrusive agent. His theory is that all disease is a function of the host, not of the etiologic agent. So, if the body is set up for cancer, then the etiologic agent can cause cancer. Dr. Levin does not focus on epidemiological studies, which indicate percentages of cancer occurrences from particular causes in designated populations to aid scientists in determining whether a specific agent can cause cancer. We have held that that epidemiological evidence is not

necessarily required for a valid expert opinion on causation so long as the expert's methods are otherwise sound. *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995). However, the district court, in the case at hand, engaged in a lengthy analysis of Dr. Levin's methods using each of *Daubert*'s four suggested factors and found that Dr. Levin's methods were not reliable.

Daubert first suggests that we should evaluate whether an expert's opinion is subject to testing. *Daubert*, 509 U.S. at 593. The district court found that Dr. Levin's testimony was not subject to testing because he started from the conclusion that picloram caused the plaintiffs' cancers and then generated, without testing, the hypotheses to support that conclusion. *Marsh v. W.R. Grace & Co.*, No. 3:90V00613, slip op. at 7 (M.D.N.C. May 26, 1998). The record supports the district court's decision that Dr. Levin's opinion is unreliable because it cannot be tested or verified consistently, and therefore, the court did not abuse its discretion.

Dr. Levin used the results of only one laboratory test performed on two of the plaintiffs to reach his opinion on causation. This test, however, did not identify the agent that caused the plaintiffs' cancers. Dr. Levin provided no other medical tests to verify his hypothesis that picloram caused the plaintiffs' cancers. We conclude that the district court did not abuse its discretion when it found that Dr. Levin needed more verification for his opinion because the defendants proposed several alternative causes for the plaintiff's cancers. The defendants presented evidence that showed the plaintiffs had been exposed to a multitude of chemicals that could cause cancer during their lifetimes, that one plaintiff had a family history of the type of cancer he contracted, and that another contracted lung cancer after a 50-year history of smoking. Dr. Levin, however, failed to verify or provide a means to verify his conclusion by ruling out any alternative causes for the plaintiffs' cancers. While an expert need not rule out all alternative causes to provide a valid opinion, he must at least explain why his opinion remains sound in light of alternative causes proposed by the other parties. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265-66 (4th Cir. 1999). This record supports the district court's finding that he did not do so adequately.

The district court also found that Dr. Levin's testimony failed the second *Daubert* factor because his theories underlying his conclusion

had not been subject to pee review or publication. *Marsh*, No. 3:90V00613, slip op. at 10. While we acknowledge that the *Daubert* analysis must be flexible and that not all medical experts' theories and methods will need to be published or peer reviewed, this is a valid consideration in considering the facts of a particular case. Dr. Levin's determination that picloram is a carcinogen is inapposite to much of the scientific literature on the subject. Neither the National Toxicology Program nor the Environmental Protection Agency have listed picloram as a carcinogen. To support his conclusion that picloram is a carcinogen, Dr. Levin stated that he read abstracts of several articles and looked at other studies. But in the face of literature and findings contradictory to Dr. Levin's determination, the district court did not abuse its discretion in finding that Dr. Levin needed further support for his independent conclusion that picloram causes cancer.

The district court noted that *Daubert*'s third factor, the potential rate of error of a technique, is not directly applicable to Dr. Levin's testimony because his technique is not susceptible to a measurable rate of error. However, we find that the district court did not abuse its discretion in deciding that Dr. Levin's failure to identify a no-effect level for picloram, and his untested assumptions with respect to the amounts of pecloram to which plaintiffs were exposed, introduce an unacceptable potential for error into his opinion that the amount of picloram to which plaintiffs were exposed caused their cancers. While Dr. Levin agreed that picloram had a no-effect level, he did not state what it was or whether the amounts plaintiffs were exposed to exceeded that level. Apparently he assumed that the plaintiffs' exposure to the chemical was about three years, and he assumed the plaintiffs had received adequate exposure to picloram to cause cancer. We find that the record supports the district court's decision that this means of analysis by assumption could lead to an unacceptable potential for error.

After reviewing Dr. Levin's affidavits and deposition testimony, we find sufficient support for the district court's determination that Dr. Levin's methods are not generally accepted by the medical community, the final *Daubert* factor. While plaintiffs argue that Dr. Levin relies on a methodology used by other immunologists and cite a portion of an article in the Journal of the American Medical Association in support of that contention, the article only supports Dr. Levin's

proposition that population studies are not determinative. While potentially true, the district court, supported by the record, found that Dr. Levin did not demonstrate that his methods used in this case are also used by experts in his field. Additionally, the record supports the district court's conclusion that Dr. Levin's opinion that picloram is a carcinogen is not generally accepted in the scientific community for essentially the same reasons we noted that this conclusion needed support either in scientific testing or through validation by peer review or publication.

B.

We grant a party's motion for summary judgment under Rule 56(c) only if the case presents no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The only evidence the plaintiffs provided indicating that the picloram in Grace's fertilizer caused their cancers was the expert testimony of Dr. Levin. Without that evidence, the plaintiffs' case is devoid of the proximate causation element. Thus, there is no genuine issue as to causation, and we are of opinion the district court properly granted the defendants' motion for summary judgment on that basis.

III.

We review a district court's decision denying leave to amend a complaint under Rule 15(a) for abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court should grant leave to amend unless the motion was made in bad faith or after undue delay, or with a dilatory motive, or the amendment would cause undue prejudice to the non-moving party, or the amendment would be futile. *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (quoting *Foman*, 371 U.S. at 182). A district court should not deny leave to amend because of mere delay. *Island Creek*, 832 F.2d at 279. Delay must be accompanied by prejudice, bad faith, or futility to comprise sufficient basis for denial of leave to amend. *Island Creek*, 832 F.2d at 279. Under the facts of this case, we are of opinion that the district court did not abuse its discretion in denying the plaintiffs leave to amend their complaints.

The district court denied Mrs. Marsh's 1992 motion to amend her complaint to include 2,4-D as a cause of her cancer after finding not

only that the plaintiff had unduly delayed in making the motion, but also that granting the motion would cause prejudice to the defendants. The court observed that the parties had engaged in extensive, continuing, and expensive discovery directed to picloram. Adding another chemical at that point in the proceedings, after defendants had filed a motion for summary judgment, would basically force the parties to start the discovery proceedings anew. Additionally, the court noted that the plaintiff had known of the presence of 2,4-D since early in the litigation and, essentially, had no justifiable reason for waiting to file her motion to amend when the court had granted one such motion in early 1991. Unlike the case in *Island Creek*, discovery here did not progress at a desultory pace, the plaintiff did not discover the new contaminant recently, and both parties had concentrated their discovery and efforts on picloram. See *Island Creek*, 832 F.2d at 279-80 (finding district court abused its discretion in denying leave to amend complaint to include a new, recently discovered basis for relief).

The district court was also acting within its discretion when it denied Speer's 1994 motion to amend his complaint. The four year delay before Speer's motion to amend was unnecessary. The same attorney represents all three plaintiffs, and he made an almost identical motion to amend in Mrs. Marsh's case. The two year delay between that motion and the one in Speer's case is unjustifiable. All of the facts necessary for such a motion had been available to the attorney for over four years. Additionally, as the district court noted, granting the motion at that time would prejudice the defendants. The case had reached summary judgment stage and the parties had completed years of discovery that the defendants would be forced to repeat if the court allowed a new causal chemical into the case. It appears that the plaintiffs' amendment was no more than a last chance attempt to ward off summary judgment, which is not well taken. Cf. *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1149 (4th Cir. 1988).

While we acknowledge that plaintiffs should have the right to amend their complaints freely as the ends of justice require, we are of opinion that the facts in this case support the district court's discretionary decisions to deny amendment to the complaints.

For the reasons expressed in the opinion of the district court, its judgment is accordingly

*AFFIRMED.**

*The motion that we reconsider a clerk's order denying plaintiffs' motion to supplement the brief is denied.

In The
United States Court of Appeals
for the Fourth Circuit

Filed
December 17, 2003

HALIA S. MARSH, Executrix of the estate of Robert Sidney Marsh, *Plaintiff-Appellant,* v. W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY, *Defendants-Appellees.*	No. 98-1943
THEODORE C. MCLEOD, *Plaintiff-Appellant,* v. W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY, *Defendants-Appellees.*	No. 98-1944
THOMAS R. SPEER, *Plaintiff-Appellant,* v. W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY, *Defendants-Appellees.*	No. 98-1945

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing in banc is denied.

Entered for a panel comprised of Judge Widener, Judge Luttig, and Judge Michael.

For the Court

/s/ Patricia S. Connor

Clerk